IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6777

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

GARY KEITH STEAGALD,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT IN FORMA PAUPERIS

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Gary Keith Steagald

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Gary Keith Steagald, respectfully prays for leave to file the attached Petition for Writ of Certiorari to the Supreme Court of the United States without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53 of the Supreme Court of the United States. This motion is made pursuant to 28 U.S.C. §1915 and 18 U.S.C. §3006A(d)(6).

In support of this motion, Petitioner shows the following:

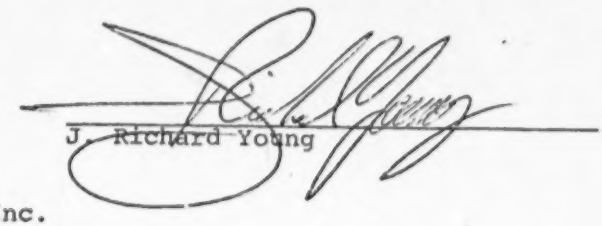
(1) Petitioner is a person for whom counsel was appointed in this case by the United States Magistrate for the Northern District of Georgia pursuant to 18 U.S.C. §3006A;

(2) Petitioner is a person for whom counsel was appointed in this case by the United States District Court for the Northern District of Georgia to pursue an appeal to the Fifth Circuit Court of Appeals pursuant to 18 U.S.C. §3006A; and

(3) Petitioner remains indigent and has advised counsel in writing, pursuant to Local Rule 7 of the Fifth

Circuit Court of Appeals, of his desire that a Petition for Writ of Certiorari be filed.

Respectfully Submitted,



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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES
IN FORMA PAUPERIS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-titled case on April 14, 1980.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is cited as United States v. Gaultney, No. 78-5329, and United States v. Steagald, No. 78-5416, 606 F.2d 540 (5th Cir. 1979), petition for panel rehearing granted in part and denied in part, petition for rehearing en banc denied, 615 F.2d 642 (5th Cir. 1980), as set out as Appendix "A".

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1980. On May 13, 1980, Mr. Justice Powell signed an Order granting until June 13, 1980 an extension of time within which to petition for certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether the Fourth Amendment to the United States Constitution requires law enforcement officers armed with an arrest warrant, but in the absence of exigent circumstances, to obtain a search warrant to enter the premises of a third party, not named in the arrest warrant.

II. Whether, assuming arguendo that the Fifth Circuit opinion in United States v. Cravero, 545 F.2d 406 (1976), enunciates good law in regard to the requirements of the Fourth Amendment, the warrantless entry into the premises involved in the instant case was made without sufficient probable cause to justify the intrusion?

CONSTITUTIONAL PROVISIONS INVOLVED

Involved in this case is the Fourth Amendment to the Constitution of the United States, as set out in Appendix "B".

RULES INVOLVED

Additionally involved in this case, by implication, are Rules 4 and 41 of the Federal Rules of Criminal Procedure, as set out in Appendix "C".

STATEMENT OF THE CASE

This criminal action was brought under a three count indictment (the Petitioner being named in Counts One and Two only) charging the Petitioner with possession with intent to distribute a quantity of cocaine (a Scheduled II controlled substance), in violation of 21 United States Code 841(a)(1) in Count One, and conspiracy to violate 21 United States Code 841(a)(1) in violation of 21 United States Code 846 in Count Two. Also charged in Counts One and Two were Cathy Gaultney, Hoyt Gaultney and James Albert Smith. Additionally, Hoyt Gaultney was charged in the same indictment with importation of the same cocaine in violation of 21 United States Code 952(a) in Count Three (R. 1-3).

Hoyt Gaultney was convicted following a jury trial before the Honorable Charles A. Moye, United States District Court Judge for the Northern District of Georgia, on all three counts in a separate and previous trial. His conviction was affirmed in United States v. Gaultney, 606 F.2d 540 (5th Cir. 1979), Petition for Panel Rehearing granted in part and denied in part, 615 F.2d 642 (5th Cir. 1980). Cathy Gaultney and James Albert Smith were tried subsequently with Petitioner, and each of them prevailed on Motions for Judgement of Acquittal at the close of the government's case in chief. (Tr. 276). Petitioner's Motion for Judgment of Acquittal at the close of the government's case was denied (Tr. 276) and upon renewing his Motion at the close of all the evidence, the Court denied the Motion again (Tr. 282).

Finally, Petitioner filed a renewal of his Motion for Judgment of Acquittal following the jury's verdict of guilty on both counts (R. 100). On June 12, 1978 Petitioner's Renewal of his Motion for Judgment of Acquittal was denied by the court (R. 108).

On June 27, 1978 Petitioner was sentenced by Judge Moye to five years on Count One and five years on Count Two to be followed by a special parole term of three years, with the sentence in Count Two to run concurrently with the sentence in Count One (R. 112). And on the same date, Steagald filed his Notice of Appeal and the court granted his Motion to Proceed In Forma Pauperis on appeal. (R. 113).

Gaultney's and Petitioner's cases were appealed separately but were joined for oral argument and were jointly decided by a panel of the United States Court of Appeals for the Fifth Circuit, which affirmed the district court citing the Fifth Circuit's opinion in United States v. Cravero, 545 F.2d 406, cert. den., 430 U.S. 983 (1976). Judge Kravitch dissented, saying that "Unlike Cravero the evidence linking the subject [of the arrest warrant] to the premises was extremely fragile and insufficient to justify an entry without a search warrant." On April 14, 1980, the same panel, in a per curium opinion, granted in part and denied in part the Petition for Panel Rehearing, and denied the Petition for Rehearing En Banc. 615 F.2d 642 (1980). Judge Kravitch again dissented on the issue of probable cause and continued that "The more important problem, however, is the extension of the rule announced in United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), a rule of questionable validity and wisdom even in the less egregious circumstances present in that case. Expansion of this rule constitutes a disturbing erosion of the Fourth Amendment rights of third parties." at 644.

STATEMENT OF FACTS

On January 4, 1978 Agent Joseph Rassey of the Drug Enforcement Administration was contacted by an individual who had provided him with information concerning drug cases in the past. This individual (hereafter referred to as C.I.) told

Agent Rassey that he might be able to locate Ricky Lyons, a federal fugitive, and a guy named "Jimmy" who he believed was a state fugitive. He further told Agent Rassey that Jimmy had some cocaine to sell (1st Supp. Vol. II, p. 43). Initially Agent Rassey was interested in the C.I. setting up the drug deal but subsequently he contacted Agent Kelley Goodowens in Savannah, Georgia and relayed the information he had obtained from the C.I.

On January 14, 1978, the C.I. called Rassey and said he had "received a phone call from Jimmy and that it was a number where Jimmy and Ricky were going to be within the next twenty-four hours" (1st Supp. Vol. II, p. 36). Rassey was unable to reach Goodowens that day and waited until Monday, January 16, 1978 to relay the phone number he had gotton to Goodowens. Rassey said that he spoke with the C.I. just prior to reaching Goodowens on the 16th and the C.I. told him the number was still good (1st Supp. Vol. II, p. 38). Rassey testified that he did not inquire to the C.I. as to what his basis was for concluding that Jimmy was calling from the particular number he had. Rassey accepted the C.I.'s conclusion because "he had always given me good information before. He said he knew they were there." (1st Supp. Vol. II, p. 50). The C.I. was unable to say from what location specifically Ricky Lyons or Jimmy were calling from or how long they would be there. Rassey testified that it was his impression "from what he said was that they were just going to be there for a while; they did not live there". (1st Supp. Vol. II, p. 47). The C.I. also told Rassey that there would be four or five people at the residence. When asked about the basis of his belief in this statement, the C.I. replied, "Well, I just know that there's you know, some people there" (1st Supp. Vol. II, p. 48). Rassey spoke with the C.I. several times by telephone on January 18, 1978 and relayed to Goodowens that the C.I. said the information was "still good" (1st Supp. Vol. II, p. 49).

On January 16, 1978 after Goodowens received a telephone number from Agent Rassey, he contacted Southern Bell's Security Division and obtained the address to the telephone number. He learned that the phone was listed in the name of Richard E. Fisher (1st Supp. Vol. I, p. 18-19). On January 18, 1978 after having difficulty locating the address, Goodowens contacted Southern Bell again and obtained detailed directions on how to get to the residence (1st Supp. Vol. I, p. 20). At no time on these days did Goodowens attempt to reach Mr. Fisher though he had determined that Mr. Fisher was located in the directory, along with another residence phone (1st Supp. Vol. I, p. 112).

On January 18, 1978, based on the information he obtained from Rassey, Goodowens decided to go to the Carey Court location in an attempt to find Lyons. Despite the fact that he was in the federal courthouse in Atlanta when he received the final call from Rassey, no search warrant was obtained (1st Supp. Vol. I, p. 79, 86-87). Goodowens testified that physically he could have obtained a search warrant, there was "no physical hindrance" (1st Supp. Vol. I, p. 87). Goodowens also had received information from Rassey that there would possibly be drugs at the residence (1st Supp. Vol. I, p. 39, 88). However, Gwinnett County Detective Fowler stated it a bit more strongly in his testimony when he testified that DE Agent Smith "had previously told me that he had information that there might be a quantity of marijuana at the location" (1st Supp. Vol. II, p. 107). And "to the best of my recollection I believe he stated 1500 pounds" (1st Supp. Vol. II, p. 108).

Agent Smith called in several other agents to accompany himself and Goodowens. None of the officers had any photographs of Lyons (1st Supp. Vol. I, p. 46) nor did they have a copy of the arrest warrant (1st Supp. Vol. I, p. 45, 46). Since none of the officers had ever even seen the arrest warrant (1st Supp.

Vol. I, p. 47), they apparently were relying on Goodowens' knowledge of the 18 month old indictment (1st Supp. Vol. I, p. 45). Only Agent Smith had testified that he knew Ricky Lyons by sight and he mistakenly thought that Gaultney was Lyons at their first encounter (1st Supp. Vol. II, p. 55).

Altogether there were nine or ten officers, some of whom had requested to come along, comprising the raid squad. All of the officers were in plain clothes and unmarked cars (1st Supp. Vol. I, p. 59). They conducted no surveillance of the residence, though they did drive by and notice that smoke was coming out of the chimney of one of the two houses at the Carey Court location (1st Supp. Vol. I, p. 61).

As the officers approached the house, guns drawn, two male individuals were seen standing at the rear of a Volkswagen. The individuals were Gaultney and Steagald. Gaultney was squatted down at the rear deck of the car. As Smith approached the car he "reached down and grabbed him and picked him up, or almost picked him up, and said 'Ricky'" (1st Supp. Vol. II, p. 55). In response to why he had done that, Smith testified "... at first I thought he was Ricky Lyons; it looked like him to me" (1st Supp. Vol. II, p. 55). When Agent Smith decided that this individual was not Lyons, he "turned him around and faced him toward the car" (1st Supp. Vol. II, p. 56). Both men were frisked right there in the driveway in plain view of the public road and identification was demanded of each of them.

Meanwhile, three other agents, including Agent Jim Williams, who arrived in a separate vehicle, headed for the A-frame(the second residence bearing the same address). These agents also approached this residence with their guns drawn. Agent Williams testified, "The purpose of going to the A-frame was the same as going to the house at the top of the hill. We didn't know which house that the individuals might have been at" (1st Supp. Vol. III, p. 17). When it became apparent that the other house was not occupied, Williams returned to the driveway

where Gaultney and Steagald were being detained. Williams testified that he thought he "left one officer down there" at the A-frame (1st Supp. Vol. III, p. 17).

After deciding that Gaultney was not Lyons, Agent Smith and another officer, Detective Conway, ran down to the house and demanded entry of Gaultney's wife, Cathy, who had come to the door (1st Supp. Vol. III, p. 51-55). Agent Smith testified that he was dressed in blue jeans with a badge clipped to the pocket of his denim shirt (1st Supp. Vol. II, p. 56); he also had his gun drawn. Agent Smith described himself as being 34 years old, six feet six and a half inches tall and weighint 270 pounds. He also testified that Mrs. Gaultney looked to be "about five foot four inches or five foot five inches, weigh[ing] less than 100 pounds, right at 100 pounds." He further stated that "the first time I saw her, frankly, I thought she was about 12 or 13" (1st Supp. Vol. II, p. 72). Smith told Mrs. Gaultney that he had a warrant for Ricky Lyons. She also correctly identified the two men outside as her husband and Gary Steagald and told Smith that she was "here by myself" (1st Supp. Vol. II, p. 77). Smith told her to "put her hands on the wall and don't move" (1st Supp. Vol. II, p. 77). Cathy Gaultney testified that Smith placed his gun in her back while she was faced to the wall (1st Supp. Vol. III, p. 56). Agent Smith then left her with Detective Conway guarding her while he searched the rest of the house. It was his testimony that she was not free to leave until "I got through searching the house. . . ." (1st Supp. Vol. II, p. 77).

As Agent Smith proceeded through the house, he went into the front bedroom and observed a small table with a set of scales and a bag of white powder on it (1st Supp. Vol. II, p. 60). Smith testified that there were two beds in the room and that he "looked under the first bed, looked over the second bed, checked it. . . ." (1st Supp. Vol. II, p. 60).

Smith left the front bedroom, checked the second bedroom and then returned to the main room and informed Detective Conway that he thought he had seen cocaine in the bedroom and that "We need to get our act together" (1st Supp. Vol. II, p. 62). Then he went outside and related this to the other agents. Goodowens suggested that Smith drive to Atlanta and assist in getting a search warrant for the house (1st Supp. Vol. II, p. 63-64).

Gaultney and Steagald were taken into the house. There is conflicting testimony as to when Gaultney was handcuffed. Petitioner testified that an officer, whom he described, handcuffed Gaultney outside the house and told Gaultney that there were "double locks on the handcuffs, so the more you move, the tighter they'll get. . ." (1st Supp. Vol. III, p. 41). Petitioner further testified that he did not recall "seeing the handcuffs off Gaultney the entire time" (1st Supp. Vol. III, p. 43). Agent Williams testified that Gaultney was not handcuffed until after Gaultney indicated a willingness to talk with him in the house (1st Supp. Vol. III, p. 66). He could not give a ready explanation as to why he handcuffed him at that point.

Petitioner was handcuffed as soon as he was taken into the house, after he had furnished the officers with all his identification. Agent Williams testified that he did not know why Steagald was being held in custody (1st Supp. Vol. III, p. 20).

Gaultney indicated to Williams that he wished to talk with him and was taken into the back bedroom. There is no dispute that Gaultney was handcuffed at this time. Agent Goodowens testified that he conducted a weapon search of the bedroom for Agent Williams' protection. This search involved looking around a small dressing table, opening drawers, and removing a closed suitcase from a closet shelf which he opened and saw what he believed to be packets of suspected cocaine (1st Supp. Vol. I, p. 37-38). Goodowens placed the suitcase at the other side of the room. At this point Agent Williams was alone with Gaultney.

During this time, Agent Smith had appeared before Magistrate Forrester in the hearing room at the Magistrate's Court and obtained a search warrant. There is some dispute as to the time of its issuance as Agent Smith does not believe that it was 8:00 p.m. when Judge Forrester signed the warrant as is so indicated on the warrant. Magistrate Forrester testified at the Motion to Suppress hearing that his recollection as to the time was not specific. There was a large wall clock in the room where the warrant was signed (1st Supp. Vol. II, p. 33). He did feel that it probably was earlier than 8:00 but he did admit that the authorization was his own handwriting and he filled in the time "8:00 p.m." (1st Supp. Vol. II, p. 25, 31-32). Agent Smith says he went immediately to a phone and called Agent Durrell at the house and relayed to him that a search warrant had been obtained. Agent Smith left the courthouse with the search warrant, stopped for something to eat and arrived back at the house after 9:00.

While Agent Smith was talking to Agent Durrell on the phone, James Smith and his wife drove up to the house. Upon entering the house both were met at gunpoint. Agent Goodowens stepped forward with a shotgun and advised he was a federal agent and ordered them both to put their hands on the wall (1st Supp. Vol. I, p. 10). Smith was searched, taken into custody, handcuffed and then taken into the living room with the other defendants. His wife, though no charges were made against her, was placed on the couch with the others. Goodowens testified that she would not have been allowed to leave (1st Supp. Vol. I, p. 108).

Agent Goodowens went to defendant Smith's truck and looked inside to see if there were any other persons in it. Determining that there were not, he returned inside (1st Supp. Vol. I, p. 108).

The search of the premises was continued before 8:00 p.m. some 10 to 15 minutes after the agents received word from

Agent Smith that the search warrant was in his possession. Subsequently several items were seized including another suitcase containing suspected cocaine (1st Supp. Vol. I, p. 93).

Agent Smith testified that he arrived back at the house sometime after 9:00 and about one-half hour to 45 minutes later he went out to Smith's Dodge truck and began searching it. He looked through papers and other items on the front floorboard and subsequently found a closed briefcase with a combination lock on it. Agent Smith took the case into the house and went through it (1st Supp. Vol. II, p. 93-94). During this time Defendant Smith was still handcuffed and being held inside the house. He did not consent to the search of the truck (1st Supp. Vol. II, p. 94). Agent Smith said he searched the vehicle to obtain evidence of Defendant Smith's identity (1st Supp. Vol. II, p. 69-70, 93-101, 109). Evidence taken from Smith's truck was suppressed by the district court below.

Each of the individuals with the exception of Smith's wife, was arrested and shortly thereafter indicted on charges relating to the cocaine seized in the search of the house. Additional warrants were later obtained for a warehouse in Gwinnett County and one in Fulton County and residences in DeKalb and Clayton Counties and various items seized. It is Appellant's contention that these searches were "fruits of the poisonous tree" as it is uncontested that they flowed from the initial search of the house.

REASONS FOR GRANTING CERTIORARI

I. A. A CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS REGARDING THE NEED FOR A SEARCH WARRANT IN ORDER TO EXECUTE AN ARREST WARRANT AT THE PREMISES OF A THIRD PARTY NOT NAMED IN THE ARREST WARRANT, WHEN POLICE OFFICERS ARE NOT CONFRONTED WITH EXIGENT CIRCUMSTANCES.

In United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), a panel of that Court held that:

> "The law of this circuit . . . is that when an officer holds a valid arrest warrant and reasonably believes that its subject is within the premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the suspect." (citations omitted) 545 F.2d at 421.

In Cravero, DEA agents, acting on an informant's tip, observed and followed three defendants, two of which were fugitives from arrest warrants, to the house of a fourth defendant. After placing the premises under surveillance for a number of hours, the agents, armed with warrants for the two defendants and another, approached the house, knocked on the door, identified themselves, and announced possession of the arrest warrants. When a defendant opened the door and tipped off the others to the presence of the agents, the latter entered without permission, arrested one fugitive defendant in the living room and the other fugitive defendant, who brandished a pistol, in the hallway. Hearing scuffling from the bathroom, and fearing the presence of the third fugitive (who had a known propensity for violence), the agents entered the bathroom in hopes of apprehending him. Instead the agents found another defendant, a certain amount of cocaine, and other narcotic paraphernalia.

Following their unsuccessful motions to suppress, and convictions, the defendants appealed on the grounds that, inter alia, the agents, in the absence of exigent circumstances, needed

a search warrant to arrest the two fugitives in the third defendant's house. In reaching the opposite conclusion, the Cravero panel held that the test of the officers' behavior is properly framed in the terms of reasonable belief. Probable cause, it held, is a concept of reasonableness, and must "always be determined by a magistrate unless exigent circumstances excuse a search warrant." However, "reasonable belief embodies the same standard of reasonableness but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances." (Footnotes omitted). 545 F.2d at 421. The Court concluded that entry to execute an arrest warrant is treated by the Fifth Circuit as an exception to the requirement of a search warrant.

Several other circuits are in agreement with the essential holding in the Cravero case. In United States v. McKinney, 379 F.2d 259 (6th Cir. 1967), the contention that, in the absence of exceptional circumstances, a search warrant must be obtained before entering the dwelling of a third party to execute a valid arrest warrant, was rejected. At 379 F.2d 263, it was held:

> "We agree with the observation that the guarantee of the Fourth Amendment that people shall be secure in their homes from unreasonable searches applies whether the government is searching for objects or for a person for whom an arrest warrant has been issued. But even if we were to except appellant's premise that a search warrant must be obtained in the absence of exceptional circumstances, there is good reason to hold that the issuance of an arrest warrant is itself an exceptional circumstance obviating the need for a search warrant. An arrest warrant is validly issued only when a magistrate is convinced that there is probable cause to believe that the named party has committed an offense." (Footnote omitted).

The Court there considered the probable cause determination to issue the warrant and the inherent mobility of the suspect as justification for the search provided that the authorities reasonably believed he could be found on the premises searched.

Similarly, in United States v. Brown, 467 F.2d 419 (D.C. Cir. 1972), it was held that "an officer with a warrant outstanding for the arrest of an individual named therein may enter upon private premises if he has reasonable cause to believe that such party can be found there." 467 F.2d at 423. Furthermore, the Court cited Rule 4(b)(1) of the Federal Rules of Criminal Procedure as supporting this position because of its command that once an arrest warrant issues, the defendant may be arrested at any place within the jurisdiction of the United States. Significantly, the Court characterized the police officers' actions in executing the search as reasonable, and stated "it is material that what the police were executing was a warrant to arrest a dangerous, usually armed man who is involved in a narcotics operation and was wanted for murder." 467 F.2d at 424.

Finally, the Tenth Circuit explicitly follows the holding announced in Cravero. In United States v. Harper, 550 F.2d 610 (10th Cir. 1977), a DEA agent received a fugitive arrest warrant for one Renita Black. The agent had previously that day received information from a reliable informant that Black was staying with Harper, and while not knowing the address that she was staying at, did provide the agent with her phone number. The phone company then traced the phone number to a certain address. The agent had received information from reliable informants that Black was staying with Harper and one Jackson, and that she had been seen in the latter's car. Upon arriving at the address, the agent was admitted by Jackson after he identified himself and related that he had a warrant for Black's arrest. Jackson then proceeded to tip Harper off that the agent

was there. The agent ran up the stairs and found Harper with an ashtray containing vegetable matter, later admitted to be marijuana. Harper dropped a sack which was later field-tested as heroin. Immediately thereafter the residence was secured while a search warrant was obtained to search the premises for drugs and weapons. The Tenth Circuit upheld the trial court's denial of the Motion to Suppress, holding that the trial court properly determined that the agent's initial entry was a lawful utilization of the arrest warrant for Black. Citing the initial opinion in Cravero the Court held that, unlike a search warrant which requires a prior judicial determination that the object sought is within the place to be searched, no such determination need be made before an arrest warrant issues. "Such a warrant requires only a judicial determination that there is probable cause to arrest a named person for a certain offense, without consideration of the place in which the arrest is to be made. . . an arrest warrant, therefore, in and of itself, imposes few or no limitations on the power of police to enter private homes in search of suspects." 550 F.2d 613-614.

Each of these cases, however, can be described as exhibiting an exigency upon which police officers had to immediately respond to in order to protect themselves or prevent the destruction of potential evidence. However, the logic of Cravero and similar decisions does not have a universal following. While the Supreme Court has not directly addressed this issue, language in previous opinions intimated that the warrant process would have to be observed. In United States v. Santana, 427 U.S. 38 (1976), a majority of the Court seemed to support the proposition that absent exigent circumstances a warrant would be needed for an entry of a home to make an arrest, except in instances where the entry is made under the "hot pursuit" exception established by the Court in Warden v. Hayden, 387 U.S. 294 (1967).

The Court has repeatedly held that searches conducted outside the judicial process, without prior approval of a judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. See Katz v. United States, 389 U.S. 347, 357 (1967). In Katz, the Court held that the Fourth Amendment protects an individual's reasonable expectation of privacy. The Court has also made clear that one's reasonable expectation of privacy in the home is entitled to a unique sensitivity from the Courts. See United States v. Martinez-Fuerte, 428 U.S. 543, 561, 565 (1976). And in Mincy v. Arizona, 98 S.Ct. 2408 (1978), the Court stated that warrantless searches must be strictly circumscribed by the exigencies which justify their initiation. It was pointed out that the mere fact that law enforcement may be made more efficient can never by itself justify a disregard of the Fourth Amendment's warrant requirement. The Court went on to hold that "warrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of the law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."

At this juncture, it is relevant to point out that Cravero is a panel decision as to a very close and controversial issue. The apparent approval of warrantless entries into a third party's house contained therein came in a brief opinion, occasioned by a denial of petition for rehearing, contained largely in a few short paragraphs which attempt to retract a preceding detailed and lengthy analysis in the main opinion of the need for either a search warrant or exigent circumstances. In such a context it is submitted that each case must be analyzed with particular care as to its individual facts, rather than be subject to a blind application of the principal

enumerated in a conclusory pronouncement in ruling on a petition for rehearing. In fact the panel noted in the first Cravero opinion that:

> ". . . Nothing in the process of procuring an arrest for A considers or affords any protection for the entirely distinct Fourth Amendment right of B, into whose premises A may wander -- perhaps after the arrest warrant issues -- not to have B's premises invaded and ransacked for A without either a warrant or one of the customary excuses for its absence."
> 545 F.2d at 415.

Without the protection of a search warrant or exigent circumstances requirement, the spector of arbitrary invasions into private dwellings becomes a reality, accompanied by the very real threat of "police circumvention of the search warrant requirement by using an arrest warrant as carte blanche to search any and every home in which they can claim probable cause to believe a suspect may be concealed." 545 F.2d at 416.

Decisions in other circuits have been opposite to that reached in Cravero. In The Government of the Virgin Islands v. Gereau, 502 F.2d 914 (3rd Cir. 1974), the Court was faced with a factual situation similar to the one involved here, except that in addition to an arrest warrant and probable cause to believe that the person named in the warrant was present on the third party's premises, the police were searching for people who had recently committed brutal murders. At 502 F.2d 928, the Court held that "arrest warrants are not substitutes for search warrants."

The Court continued to specifically state that "although police have warrants for the arrest of suspects, they may enter premises, at least of third person's, to search for those suspects only in exigent circumstances where the police officers also have probable cuase to believe that the suspects may be within."

The Court later went on to hold that certain exigent circumstances applied there, which in effect validated the warrantless entry.

That same year the Third Circuit was presented with a similar problem in Fisher v. Volz, 496 F.2d 333 (3rd Cir. 1974). There, persons whose apartments had been searched by police officers, who had arrest warrants for persons believed to be in the apartments, brought actions against police officers claiming Section 1983 violations of the apartment dwellers' rights. The Court stated that the Supreme Court has recognized that the physical invasion of the home is "the chief evil" to which the Fourth Amendment is historically directed, citing United States v. United States District Court, 407 U.S. 297, 313 (1972). The Court went on to hold that:

> "Even if exigent circumstances exist, police officers without a valid search warrant may not constitutionally enter the home of a private individual to search for another person, although he be named in a valid arrest warrant in their possession, absent probable cause to believe that the named suspect is present within at the time." 496 F.2d at 338.

At 496 F.2d 339 the Court continued, "in addition to probable cause, there must be exigent circumstances to justify a warrantless search."

Furthermore, the Fisher Court analyzed the inter-relation between the Fourth Amendment and probable cause and exigent circumstances. It was noted that the:

> "effective enforcement of the law . . . can only be maintained by respect for the law. High on the list of constitutional rights is the right of an innocent citizen to be free from unreasonable intrusion into the privacy of this home. A warrant for the arrest of a suspect may indicate that the police officer has probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect is in some stranger's home." 496 F.2d at 341.

However, the Third Circuit was clearly aware of the necessity for efficient law enforcement, and held that the police under exigent circumstances may dispense with the search warrant when they have probable cause to believe that the suspect named in the arrest warrant is in a particular third party dwelling. There the arrest warrant names a specific person, and therefore avoids the absue inherent in the type of general warrant that supported the formulation of the Fourth Amendment.

The Ninth Circuit has also recognized the balance between efficient law enforcement and the protection of third party Fourth Amendment rights. This balancing was apparent in United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978). In Prescott postal inspectors were investigating one Duvernay for using stolen credit cards to obtain merchandise by mail, and in the course of their investigation supervised a controlled delivery to one of the suspect's addresses. The postal inspector obtained a search warrant for Duvernay's apartment, but did not obtain a warrant for Duvernay. Appellant's apartment was located next door to Duvernay's on the top floor of a partially vacant apartment building. The police raided the apartment building following the controlled delivery, only to find that Duvernay's suspected address was only a padlocked apartment. The inspector then went to Prescott's apartment, knocked on the front door, identified himself as a postal inspector, and said that he was looking for a next door neighbor. Prescott lied, claiming that no one was in the apartment but her, her husband and her baby, when in fact her neighbor had appeared with the packages in hand only minutes before and had been let into the apartment. The inspector, after a conference with his colleagues, returned to Prescott's apartment and again unsuccessfully tried to get Prescott to open her door. After responding in the negative to Prescott's query as to whether the inspector had a warrant, and the inspector's

threat that Prescott could be guilty of an offense if she was harboring her neighbor, the inspector sought legal advice from the United States Attorney's office. The end result was that the police broke the door down, found Duvernay inside as well as the three packages prepared for the controlled delivery.

Prescott was indicted and subsequently convicted of being accessory after the fact by assisting Duvernay in order to hinder his apprehension. Her motion to suppress all fruits of the entry into her apartment was denied, the district judge taking the view that the officers needed no warrant to enter the apartment because they had probable cause to arrest Duvernay and to believe that he was inside.

The Ninth Circuit had previously stated only in dicta that the warrant requirement "is applicable not only in cases of entry to search for property, but also in cases of entry to arrest a suspect," United States v. Phillips, 497 F.2d 1131, 1135 (9th Cir. 1974). But the Court noted that only exceptional circumstances have been held sufficient to justify a search conducted inside a private home without judicial authorization. 581 F.2d at 1349. The Court quoted McDonald v. United States, 335 U.S. 451, 456 (1948), where it was stated:

> "The Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing . . . that the exigencies of the situation made that course imperative." 581 F.2d at 1349.

The Court further reasoned that had the officers arrested the suspect on the street, and then entered Prescott's apartment solely to search for the packages, their certainty that the objects they sought would be found within would not have excused their failure to obtain a warrant. Likewise, had they gazed through a window and observed the packages lying on a table, in

plain sight, they would nonetheless have been obliged to submit their evidence to a magistrate for his disinterested determination that intrusion was necessary.

Thus the Court held, "the sanctity of the home is no less threatened when the object of police entry is the seizure of a person, rather than a thing. A magistrate's disinterested determination that governmental intrusion is warranted is no less desirable when the policeman's quarry is a suspect, rather than a piece of evidence." 581 F.2d at 1343. Citing People v. Ramey, 16 Cal. 3rd 263, 275, 545 P.2d 1333, 1340 (en banc) (1976), the Court held that it would be thoroughly incongruous "to pay homage to the considerable body that has developed to protect an individual's belongings from unreasonable search and seizure in his home and at the same time assert that identical considerations do not operate to safeguard the individual himself in the same setting," and that this reasoning is equally applicable when it is a third person, present in the home with the householder's consent for whom the police are looking. The Court concluded that absent exigent circumstances, police having probable cause to arrest a felony suspect must obtain a warrant before entering a dwelling to carry out the arrest.

Furthermore, the Sixth Circuit in United States v. Shye, 492 F.2d 886 (1974), has held that warrantless entries of dwellings to effect an arrest are put on the same constitutional footing as warrantless entries of dwellings to effect a search. The Court held that entry in both instances is per se unreasonable "unless" exigent circumstances justify the failure to obtain a warrant.

The Eighth Circuit raised the similar issue in discussing the minimum requirements for a reasonable search in the case of Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975), reversed on other grounds, Stone v. Powell, 428 U.S. 645 (1976). The Court there held that:

> "Police entry into a private dwelling without a search warrant in search of a suspect for whom an arrest warrant has been issued carries precisely the same Fourth Amendment implications as entry into a dwelling to make a warrantless search for tangible property. Citizens are entitled to the same constitutional protection from unreasonable searches and seizures when the police are seeking a suspect for arrest as when they are seeking some contraband for evidence. Thus, 'arrest warrants are not substitutes for search warrants'. Government of the Virgin Islands v. Gereau, 502 F.2d 914, 928 (3rd Cir. 1974).
>
> Consequently, we hold as have several other courts of appeals, that the Fourth Amendment mandates as a minimum, that police officers may not enter the dwelling or premises of a third person in search of a suspect for whom they have a valid arrest warrant unless they have reasonable or probable cause to believe that the suspect is within." 513 F.2d 1291-1292.

The Court further noted that given the factual setting of the case before it, it need not consider the exact question that is at issue here.

Other Courts have also come down on the opposite side of the issue from Cravero. In Huotari v. Vanderport, 380 F.Supp. 645 (D. Minn. 1974), the Court, while presented with a factual issue as to whether an arrest warrant had issued, did hold that "even conceding the existence of probable cause, the Court is not prepared to say that a search warrant is not necessary where the search is for a person rather than for 'effects'". 380 F.Supp. at 649. Moreover, in Norton v. Turner, 427 F.Supp. 138 (E.D. Vir. 1977), the district court discussed the standards applicable to execution of an arrest warrant at the residence of a third party not named in the warrant. This case was a Section 1983 cause of action resulting from the unsuccessful search of the plaintiff's premises by police officers looking for the then fugitive Patty Hearst. The plaintiff contended that the police were required to obtain a search warrant in order to lawfully execute the arrest warrant in the dwelling of a third person, and that only exigent circumstances can relieve the

officers of this obligation. The district court however was satisfied that if the officers had probable cause to believe that Ms. Hearst was in the apartment, their subsequent conduct was justified. The fugitive in question had demonstrated a capacity for both violence and evasive flight, and the Court cited Cravero for this proposition.

In addition at least one state court has followed the reasoning that an arrest warrant alone in the absence of exigent circumstances is not sufficient in order to seize the fugitive from the dwelling of a third person. In England v. State, 488 P.2d 1347 (Okla. 1971), police officers, equipped with both the knowledge that there was an outstanding arrest warrant for a person who was AWOL from a marine corps base and probable cause to believe that the fugitive was at a certain address, approached the address one evening. At that point the police officers smelled marijuana, and upon viewing the inside of the house through a window noticed the defendant and others smoking a marijuana cigarette. The police entered and arrested defendant. The Court of Criminal Appeals reversed defendant's conviction for possession of marijuana, the Court holding that the officers should have armed themselves with a warrant if they were going to a residence just to search for the suspect. The record was silent as to whether or not they found any trace of the person who was suspected of being AWOL. The Court held that to go to a private residence and search for an accused without a search warrant is not authorized by law. 488 P.2d at 1348.

Therefore, as can be seen, several circuit courts have been faced with the question posed in the instant case and decided that law enforcement officers entering the homes of third parties to effect an arrest should be armed with a search warrant or in the alternative, enter only where exigent circumstances exist. Thus, the essential issue in the immediate

inquiry must be whether exigent circumstances will be the only factors allowing police officers to disregard the need for a search warrant when executing an arrest warrant on the premises of a third person. Petitioner submits that the issue of exigent circumstances not only distinguishes his case, but also demonstrates the impropriety of the blanket rule as set forth in the second Cravero opinion.

In Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), in a leading, widely cited case, the Court held that entry into a home to make an arrest may not be undertaken without a search warrant and the requirement of a warrant may not be excused except under specially defined circumstances.

At 435 F.2d 389, the Court stated:

> "The Fourth Amendment provides protection even as to arrests in a public place, though in such cases the requirement is only that there be probable cause and there is no additional requirement of recourse to a warrant. A greater burden is placed, however, on officials who enter a home or dwelling without consent. Freedom from intrusion into the home or dwelling is the archetype of the private protection secured by the Fourth Amendment. In general a home may not be searched without a warrant notwithstanding probable cause."

The Dorman Court stated that warrantless entries may be justified by need when the officer acts within the bounds of probable cause and reasonableness. The Court outlined several considerations it thought would be useful in determining the propriety of a warrantless entry into a home to effect an arrest.

Among the exigent considerations enumerated were:

1. That a grave offense is involved, particularly one that is a crime of violence;
2. Whether the suspect is reasonably believed to be and therefore represents, a threat to the community or to the arresting officers;

3. There must be a clear showing of probable cause which includes reasonable trustworthy information to believe the suspect committed the crime involved;
4. There must be strong reason to believe that the suspect is in the premises being entered;
5. There must be reasonable likelihood that the suspect will escape if not swiftly apprehended;
6. The entry, though not consented to, must be made peaceably.

In applying the Dorman criteria to the instant case, it is clear the conduct of police officers here does not meet the minimal requirements of the Fourth Amendment as set out by Dorman.

First, the offense charged in the arrest warrant was not a grave one. Agents entered the dwelling to search for a "Ricky Lyons" who was charged with possession of marijuana. The Dorman Court suggested violence is usually the determinate of whether an offense is considered grave. Possession of marijuana is not a grave offense nor is it a crime of violence.

Second, there was no evidence to lead the agents to reasonably believe that the suspect sought, a "Ricky Lyons", would be armed, nor was there a showing of increased danger to the community or the officers involved had there been a delay for purposes of securing a warrant. In fact, the officers had ample time and opportunity to secure a warrant but chose not to do so.

Third, Petitioner concedes that there was an arrest warrant outstanding for Ricky Lyons but law enforcement officials did not have any warrant in their possession when they approached Appellant's home.

Fourth, the government agents did not have strong reasons for believing Ricky Lyons was in Appellant's home. To the contrary,

the agents had a mere tip that Ricky Lyons was on Appellant's premises. The agents did not conduct surveillance of the premises. The agents received information from a confidential informant who stated that he talked via telephone with a person named Jimmy and that he heard Ricky Lyons' voice in the background two days earlier. The confidential informant did not talk to Ricky Lyons nor did he have any other facts to support his contention that Ricky was in the location where the telephone conversation originated. The informant told the agents that "Jimmy" said that they (Jimmy and Ricky Lyons) could be reached at the telephone number given the agents. "Jimmy" was never identified nor was his reliability established. So armed with the mere telephone number of an unsupported allegation that Ricky Lyons would be on the premises, the governmental agents proceeded to execute the warrant at the appellant's residence. There existed no strong reason to believe Ricky Lyons was in the premises that were to be entered.

Fifth, the facts of the instant case cause it to fail the requirement that the suspect be swiftly apprehended to avoid escape. There existed no urgency. The agents had the information for almost two days and the agent in charge of the case stated that they had ample time to obtain a warrant to search the premises had they sought to secure one. Additionally, there was no other evidence to indicate impending flight by the suspect.

Sixth, the entry, although made under color of law, was not peaceable. The officers approached with shotguns. Service revolvers were drawn on the occupants.

Thus, the facts in Petitioner's case do not meet any of the criteria set out as exigencies in Dorman. This is a key distinguishing factor between Petitioner's case and Cravero and its progeny. These distinctions, plus the split in the Circuits, are strong reasons for granting the writ.

B. FOLLOWING PAYTON, THE FIFTH CIRCUIT DECISIONS IN CRAVERO AND IN THE INSTANT MATTER IGNORE THE FOURTH AMENDMENT RIGHTS OF THIRD PERSONS, AND IN EFFECT, OFFER LESS CONSTITUTIONAL PROTECTION TO THIRD PERSONS NOT NAMED IN THE ARREST WARRANTS THAN TO THOSE INDIVIDUALS WHO ARE THE SUBJECT OF THEM.

In the recent decision of Payton v. New York, 27 Cr.L.R. 3033 (USSC, 1980), the Supreme Court answered the question left open not only in its own opinions, but in those circuit opinions where Cravero-type issues were involved; namely by holding that the Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. While the majority opinion expressly avoided answering the question involved here, there can be no doubt that by further defining the Fourth Amendment rights of a suspect arrested in his own home, this answer will have a profound effect on the Fourth Amendment rights of suspects and third persons when law enforcement officers attempt to execute arrest warrants for fugitives on premises of third persons.

For example, suppose Fourth Amendment law is "frozen" at Payton. This means, that on one hand, police officers armed with probable cause and in the absence of exigent circumstances, must have an arrest warrant to enter and seize a suspect in his own dwelling. On the other hand, if Payton applies only to the requirement of a warrant to arrest a fugitive on his own premises, in the absence of exigency, the result would be anomolous and illogical constitutional applications in about half of the federal jurisdictions in the country. This is because their execution of arrest warrants on third person's premises would require either (a) at least probable cause to believe the suspect is located therein, Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (en banc); or (b) probable cause and exigent circumstances, Dorman, supra; or (c) probable cause and an arrest warrant, Cravero, supra.

Even assuming that the arrest warrant requirement would be extended to arrests of fugitives on third person's premises, none of the above examples provide any more protection to the third person against unreasonable searches and seizures. The result, therefore, would be no difference at all between the arrest by arrest warrant of the fugitive on his own premises and the arrest by arrest warrant of the fugitive on the premises of a third person not named in the arrest warrant, with no provision for third person's rights. There can be no doubt that disregarding the third person's Fourth Amendment rights creates a grave constitutional dilemma.

The majority opinion's language in Payton is instructive. At 27 Cr.L.R. 3037, the opinion cites Judge Leventhal's conclusion that an entry to arrest and an entry to search for and to seize property implicate the same interests in preserving the privacy and sanctity of the home, and justify the same level of constitutional protection. Petitioner submits that the existence of an arrest warrant for the arrest of a fugitive does absolutely nothing to preserve the privacy and sanctity of the home of the third person upon whose premises the arrest warrant was executed.

In addition the Court continued, "in terms that apply equally to seizures of properties and seizures of persons, the Fourth Amendment has drawn a firm line to the entry of the house. Absent exigent circumstances that threshold may not reasonably be crossed without a warrant."

Finally, the concluding language in Payton holds much significance for the case at bar. "Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause explicitly carries with it the limited authority to enter a dwelling in which the suspect lives, when there is reason to believe the suspect is within." (27 Cr.L.R. at 3041) (emphasis supplied). Therefore, it can be seen that the requirement of an arrest warrant in order to

arrest a suspect in his own home, as stated in Payton, ensures that the Fourth Amendment rights of the suspect are protected because of the sanctity that his home constitutionally holds for him. An arrest warrant of the same suspect on a third person's premises would not protect the sanctity of the third person's home.

The holding in Payton merely confirms in express terms what the Court has sometimes said only impliedly in regards to its preference for judicially approved warrants. The classic statement of this police was made in Johnson v. United States, 333 U.S. 10, 13-14 (1948):

> "The point of the Fourth Amendment which often is not grasped by zealous officers, is not that it denies law enforcement to support the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out the crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the peoples' homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

Historically, however, the need for warrants and the requirements of both a search warrant and an arrest warrant have been confusing. As the Fourth Amendment states:

> "The right of the people to be secure in the persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by

> Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (emphasis supplied).

Police authority to conduct searches for property is constrained by the general rule that searches without a search warrant are per se unreasonable unless they fall within certain specific exceptions. Therefore, the issuance of the search warrant usually depends upon a judicial determination of both the need for the proposed seizure and the probable cause to believe the object sought is within the place to be searched.

On the other hand, if the object of the search is a person, the rule seems to be that all that is necessary is an arrest warrant. Further, the arrest warrant, unlike the search warrant, does not require any prior judicial finding of the need for the police to search or of the probability that the search will be fruitful. Moreover, arrest warrants require no reference to the places that may be searched in effecting the arrest. For example, nothing in Rule 4 of the Federal Rules of Criminal Procedure refers to the place to be searched. And historically, persons who are the object of a search have not been constitutionally characterized as have "things" that are the object of a search, even though both "objects" are listed side-by-side in the amendment. Only Delaware and Vermont statutorily provide for a search warrant for persons. See Rotenberg and Tanzer, Searching for the Person to be Seized, 35 Oh. St. L. J. 56, 58 (1974), where it is concluded that there is no satisfactory justification for the difference and that, therefore, the Fourth Amendment requires that the legal standard and procedural practice developed for searches for objects be applied to searched for persons.

Moreover, in addition to the confusion resulting from the different warrant requirements regarding searches for persons and searches for objects, in 2 W. LaFave, Search and Seizure §6.1 (1978), it was noted that uncertainty has resulted from courts' use of the general word "warrant", instead of differentiating between a search warrant and an arrest warrant. "Perhaps as

a consequence of this or perhaps because warrants to search for a person are unknown in many jurisdictions, many of the cases holding or assuming that a warrant is required for a nonemergency arrest entry assume without question that an arrest warrant rather than a search warrant is required," (footnotes omitted), although there is a growing body of authority that states that what is required when an arrest warrant is executed upon a third party's premises is a search warrant. p. 383-384. Professor LaFave continued:

> "When entry into premises other than those of the person to be arrested is contemplated, then surely it is the protection provided by a search warrant rather than an arrest warrant which is most needed. . . A prior judicial determination of the grounds to arrest a person the police believe is therein will primarily protect that person, who is not deemed entitled to such protection when arrested on the street, but would only indirectly protect the person whose premises are intended to be entered. The latter individual would more directly benefit from a judicial determination as to whether it is probable the wanted person is precisely in those premises, which also is likely to be a more complicated issue than the probable-cause-to-arrest question." (footnotes omitted) pp. 384-385.

C. THE CRAVERO OPINION UPON REHEARING, FOLLOWED BY THE FIFTH CIRCUIT IN THE INSTANT MATTER, IS CONTRARY TO BOTH SUPREME COURT AND FIFTH CIRCUIT DECISIONS.

In its initial decision, the Cravero Court waivered between what it saw as the few or no limitations on the power of police to enter private homes in search of suspects when equipped with arrest warrants, and the need for a disinterested judicial officer whose approval for a search could apply only to a particular place and after a showing of probable cause.

At 545 F.2d 416, the Court seemed to finally adopt the very legal reasoning that Petitioner is advocating:

> "Only in certain carefully defined classes of cases is a warrantless search permitted. This preference for a prior judicial determination should control a contemplated entry of a third party's home, regardless of what is sought. While the ultimate objective of an arrest entry is an arrest, the arrest can only be effected if the subject is first found and thus a search is a necessary factual prerequisite to the possible arrest. A search warrant would be required, in the normal case and absent some exception, to enter a residence to search for a stolen pet or other objects seen carried into it. We are unable to see a distinction valid for Fourth Amendment purposes between an entry to search for such an object and entry to apprehend a quest. Consequently, logic demands that the rules governing searches should apply with equal force to an arrest entry into a third party's home. If the policeman has probable cause to believe that a suspect he wishes to arrest is inside the home, he can demonstrate this to a magistrate and obtain a search warrant for the suspect. If he fails to obtain a warrant, then an arrest entry without a search warrant will be permissible only if exigent circumstances or some other established exception to the warrant requirement obtains. (Emphasis supplied).

The panel was wary lest some other result would raise the spectre of police circumvention of the search warrant requirement by using an arrest warrant as carte blanche to search any and every home in which they can claim probable cause to believe a suspect may be concealed. "Furthermore, a requirement of exigent circumstances will not unduly burden law enforcement officials or create additional danger, since such factors are given considerable weight in the exigent circumstances determination." Id. (Footnote omitted).

At this point, the panel opinion began to muddy the waters. The panel was evidently concerned about the difference between an illegal entry in order to effect an arrest and an invalid arrest. The Court, of course, was essentially correct

in realizing that an illegal entry for purposes of executing a valid arrest warrant would not necessarily invalidate the arrest and require that the arrested fugitive be set free. However, the Court confused, as in the instant matter, the difference between the Fourth Amendment requirements for the fugitive and the separate, individual and independent requirements of the Fourth Amendment as applicable to the third person upon whose premises the arrest warrant is executed. In United States v. Cisneros, 448 F.2d 298 (9th Cir. 1971), it was noted that "the legality of the entry is a question apart from the initial validity of the arrest, whether it is based upon a warrant or probable cause. (Citation omitted). Assuming a valid basis for arrest, an illegal method of execution, for instance, an unlawful forcible entry, can result in the exclusion of any evidence obtained as a result of the officer's illegal conduct." 448 F.2d at 303 n.6. The same logic would seem to apply in the instant case. There is no logical reason to contend that evidence seized from an arrestee by police officers illegally, even though the factual predicate to the illegal seizure was a valid arrest, is remedied by suppression, but that third persons, upon whose premises an arrest warrant was executed and who are likewise aggrieved by an illegal search and seizure, have no right in suppression.

Furthermore, the Cravero Court held that since the arrest, if not the entry, was proper, arrest warrants represented judicial sanction of the deprivations of the suspects' liberties. However, this provides absolutely no safeguard to the constitutional rights of the third person whose right to privacy and sanctity in his own home was trampled upon.

But, upon rehearing, the panel cited the Supreme Court's decision in Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925), as standing for the proposition that an entry to execute an arrest warrant is an exception to the

requirement of a search warrant to intrude into a home. 545 F.2d at 421. However, the facts and holding in Agnello are contrary to this. In Agnello, it was held that once the suspects were arrested in one residence, the police officers could not then go around the corner and search and seize contraband from one of the suspect's houses without a search warrant. At 46 S.Ct. 6, it was stated:

> "[I]t has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. (Citations omitted) . . . The search of a private dwelling without a warrant is in itself unreasonable and abhorant to our laws.
>
> * * *
> Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

The panel rehearing claimed that it had "overlooked" the law of the Circuit, that when an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the suspect. For its authority, the panel relied upon two cases in which a key factor in both was exigent circumstances. As to the original decision's fear that without the protection of a search warrant or exigent circumstances requirements, the spectre of arbitrary invasions into private dwellings becomes a reality, accompanied by the very real threat of "police circumvention of the search warrant requirement by using an arrest warrant as carte blanche to search any and every home in which they can claim probable cause to believe a suspect may be concealed," the instant case presents just that situation.

There was no exigency here -- no suspect alerted so that flight or destruction of evidence was a possibility. No inconvenience or delay would have resulted from the procurement of a warrant. Agent Goodowens was in the federal courthouse during business hours on a weekday when, at about 2:00 p.m., he received the final call which triggered the raid.

Further, an analysis of the facts of the instant case demonstrates numerous critical distinctions from the factual situation presented in Cravero and the cases expressly relied upon there in United States v. James, 528 F.2d 999 (5th Cir. 1976) and Rodriquez v. Jones, 473 F.2d 599 (5th Cir. 1972).

Cravero involved an ongoing drug investigation in which government agents, acting on an informant's tip, themselves observed Chandler and Cravero in a restaurant. Both men were followed and seen entering a house, again by law enforcement personnel. This house was placed under surveillance and the actual arrest warrants were obtained. The agents, with the arrest warrants, knocked on the door. It was opened by the house owner who shouted, "Hey you guys, the police," after which the officers entered and saw contraband in plain view. 545 F.2d at 412-13.

Rodriquez, supra, involved a shooting following forcible, warrantless entry in a residence where police mistakenly believed there were two men there who were suspected of murdering three deputy sheriffs just three days before. The information placing the suspects in the residence came from a C.I., previously proving reliable, who stated that he had seen the two suspects enter the garage. Further, the C.I. was taken by the apartment by officers three times, and each time he confirmed it to be the location he himself saw the men enter. 473 F.2d at 606.

was apparently unoccupied at the time. (Query: what would have been the officers' actions if people had been found in the A-frame house?). Most damning of all, is the fact that in the instant case no attempt of any kind was made to surveil the premises before an armed raiding party swooped down with weapons drawn on both residences.

In addition, the forceful manner in which the searches were executed must also be considered. In Cravero the officers approached peacefully and were met by the resident at the door, entering only after that person attempted to alert the others. In a case involving a similar issue (entering into a suspect's home to arrest on probable cause), United States v. Santana, supra, Justice White emphasized in his concurring opinion that "a warrant was not required to enter the house to make the arrest, at least where entry by force was not required." 427 U.S. at 43-44 (emphasis added).

Here the force was unnecessary and excessive. Two men, neither of them fugitives, were accosted at shotgun point by a portion of a raiding party numbering nine or ten men, thrown up against a car, frisked and detained. A young woman who truthfully told Agent Smith who she was, who the men seized at the car were, and that no one else was in the house, was accosted at gunpoint and placed against the wall and detained under guard as the house was searched.

Finally, the instant case raises the spectre referred to in the original Cravero opinion -- police circumvention of the warrant requirement through use of an arrest warrant. 545 F.2d at 416. While Agent Goodowens in his testimony attempted to downplay the significance of the C.I.'s information regarding the possible presence of contraband at the location, the testimony of Detective Fowler that Wayne Smith told him there might be "1500 pounds" of marijuana there strongly indicates something more was involved in their trip to see if Ricky Lyons was present.

James, supra, likewise involved a tip by informer that a fugitive was present at a particular location. Moreover, before the house was entered, agents announced their intention over a bullhorn, and repeated twice their purposes and requests. This occurred during daytime hours, and entry was made only subsequent to the officers being fired upon by occupants of the building. The facts presented in the instant case set up distinct and critical contrasts to these three cases. First, the instant case involved the pursuit of a federal fugitive on an indictment over eight months old for a non-violent crime (a marijuana offense) (1st Supp. Vol. I, p. 45, 47). Clearly this case lacked any element of freshness or emergency to justify unusual steps such as seen in Rodriquez and James, supra.

Further, the officers here, unlike those in Cravero in particular, did not have in their possession the actual arrest warrant for the fugitive they were allegedly seeking (1st Supp. Vol. I, p. 47). In fact none of the officers had even seen an arrest warrant for Lyons and no copy of the warrant was even available in the Atlanta area at the time (1st Supp. Vol. I, p. 47). While possession of the actual warrant in hand seems not to be a requirement under federal law, it is a requirement under Georgia law, State v. Shafer, 193 Ga. 748 (1942). Further in United States v. Harper, supra, it was held that "in the absence of a contrary federal statute, as in the case at hand, the validity of an arrest is controlled by the law of the state where the arrest occurred." 550 F.2d at 614. In Harper, a case that cites Cravero as law, there existed a Kansas statute which allowed the entry into a building to execute an authorized arrest. The policy reasons for such a requirement are clear and strong -- a legal document should be available to justify to persons present the necessity of the entry and procedures accompanying it. Michigan v. Tyler, 98 S.Ct. 1942 (1978).

Moreover, the Court in Cravero emphasizes that the situation envisioned there is one which "allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate . . ." 545 F.2d at 421 (emphasis added). Cravero, as the Court emphasizes in its opinion, involved one contemporaneous trip to a judicial officer, and merely excused a second trip. In the instant case there was no trip to the magistrate, but merely reliance on Agent Goodowens' memory that Lyons had been indicted in July of 1977 for a marijuana offense and had not been brought to trial.

In regard to the probable cause, or reasonable belief as to Lyons' presence at the residence, a strong contrast exists with the existing cases approving warrantless entry. Cravero involved the officers themselves seeing the two sought-after fugitives enter and remain in the house. Rodriquez involved a reliable C.I. plus further corroboration of his information by officers taking him by the location three times. James involved a reliable C.I. plus a bullhorn announcement, with entry following only after a shootout. Here, we have a C.I. providing information which is clearly not based on first-hand observation, followed by a clear and seemingly intentional failure of the officers to take any steps to corroborate the information prior to a full-blown armed raid. Although these officers here determined that a house on Carey Court had the specific telephone number referred to by the C.I., they had only been able to determine the "general location" of the house from Southern Bell. Although they determined the phone was listed to a Richard E. Fisher, no effort was made to either contact or even investigate the apparent owner of the residence. Further, upon arrival at the location, agents were faced with two houses at the same address. Not knowing which house they were looking for, the agents hit both houses, with drawn weapons, leaving the second only after discovering that it

The facts and circumstances of the instant case require a reassessment of the applicability of the principles enumerated in Cravero. The instant case illustrates the fear spoken of in the main opinion in that case and the facts here -- most notably the conduct of the officers -- will require significant and dangerous expansion of the limited concept adopted in the opinion of the Court on the petition for rehearing.

II. ASSUMING ARGUENDO THAT THE FIFTH CIRCUIT OPINION IN CRAVERO ENUNCIATES GOOD LAW IN REGARD TO THE REQUIREMENTS OF THE FOURTH AMENDMENT, THE WARRANTLESS ENTRY INTO PETITIONER'S HOME WAS MADE WITHOUT SUFFICIENT PROBABLE CAUSE TO JUSTIFY THE INTRUSION.

In its opinion on the petition for rehearing, the Court in Cravero adopted a test of "reasonable belief". On close reading, this is merely a substitute for probable cause, adopted because the implication contained in the term probable cause is the requirement of either a magistrate's determination or exigent circumstances. 545 F.2d at 423. First, the validity of this statement should be analyzed in light of Ybarra v. Illinois, 100 S.Ct. 338 (1979), where it was held that the requirement that a search or seizure of a person be supported by probable cause particularized with respect to that person cannot be undercut or avoided by simply pointing to the fact that coincidently there exists probable cause to search or seize another, or to search the premises where the person may happen to be. However, in essence, what the Cravero court says is that it will apply a concept of reasonableness which "embodies the same standards of reasonableness" as probable cause, but remove the implication of either magistrate or exigency. Id.

As a consequence, when the "reasonable belief" of the officers as to the presence of the fugitive is based on information supplied by a C.I. instead of their personal observation as is found in Cravero, this "reasonable belief" should be analyzed in

terms of the case law governing probable cause determination based on similar situations, with the principal point of departure being the two-pronged analysis developed by the Supreme Court in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and discussed in Spinelli v. United States, 394 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). After the C.I. meets the reliability test, there must be an examination of the "underlying circumstances" -- the manner in which the information was gathered by the C.I. What is generally required is a statement from the C.I. containing sufficient detail or representation permitting the magistrate to determine the C.I.'s conclusions were justified and not mere rumors or suspicion. In the absence of this, corroborating evidence as to the tip developed by the officers and submitted along with the tip is acceptable. Id.

An analysis of the tip in this case in light of these principals demonstrates that its "underlying basis" was clearly lacking. As a consequence, the reasonable belief test of Cravero was not met.

The first report of the confidential informant to Agent Rassey of any substance came on January 16, 1978. Previous reports had been nonspecific information (on January 4, 1978) (1st Supp. Vol. II, p. 34, 41) and (on January 14, 1978) a telephone number for Ricky Lyons and "Jimmy" good only for "24 hours" (1st Supp. Vol. II, p. 36). On January 16, 1978, however, the C.I. called Rassey and told him he talked to "Jimmy" and heard a voice he identified as Ricky Lyons in the background and they were calling from a specific number. When pressed by Rassey for more details -- the underlying circumstances -- the confidential informant could not tell him where the residence was located or if Ricky Lyons and "Jimmy" lived there, only that they were at that number "for a while" (1st Supp. Vol.

II, p. 39). Again and again in his testimony, Rassey admits that he accepted the conclusion of the confidential informant that they would be there:

> A. . . . All he knew was that they were there and that they were going to be there for a while. (1st Supp. Vol. II, p. 39).
>
> * * *
>
> A. I asked him, "Are you sure they are both going to be there?" He said, "Yes". That's all he told me. (1st Supp. Vol. II, p. 47).
>
> Q. Did he give the basis of this belief?
>
> A. I asked him about that. I says, "How do you know," he says, "Well, I just know that there's, you know, some people there."
>
> Q. Just speculation?
>
> A. I don't know. (1st Supp. Vol. II, p. 48).

Even more telling is an examination of the basis for the confidential informant's critical conclusion that the call reported to Agent Rassey on January 16, 1978 came from the telephone number that Ricky Lyons and "Jimmy" were to be found at. On cross-examination on this point Rassey gave the following answers:

> Q. He [the confidential informant] told you [on January 16, 1978] that he was speaking with a guy named Jimmy and he heard Ricky's voice, or a voice he identified as Ricky's in the background, is that correct?
>
> A. (Agent Rassey) Yes.
>
> Q. Ok. Where was he speaking from at the time? I mean Jimmy when I say "he". Did your informant tell you that?
>
> A. They were at the number that he had given me near Atlanta.
>
> Q. How did you ascertain that from your informant?

A. I asked him. I says, "Where are they at?" And he says, "They're at the number I gave you." I says, "Are you sure?" He said "Yes".

Q. Did you go into the basis for that, how he knew that?

A. No I didn't, I just asked him if he was positive, and he has always given me good information before. He said he knew they were there. (1st Supp. Vol. II, p. 50) (emphasis added).

Finally, on the very day of the raid, the last communication from the C.I. to Rassey was that "the information he had given me was still good." (1st Supp. Vol. II, p. 49).

A careful review of the information furnished by the confidential informant to Agent Rassey yields the conclusion that there is a complete dirth of the requisite underlying circumstances -- the necessary detail to show the informant had hard information and not just rumor. Moreover, the conduct of the officers in Georgia did nothing to provide -- or even attempt to provide -- corroboration for the C.I.'s information. All they found was that the number was listed in the Buford area to a Richard Fisher. No individual known to associate with Richard Lyons was seen or connected with the location. Even the particular house was not located. Most critically of all, no surveillance was undertaken or even attempted (1st Supp. Vol. I, p. 52). A raid was mounted and launched and carried out with extreme and unreasonable force on the basis of a series of tips by a confidential informant, and the tip failed to meet the second prong of the Aguilar test.

As such there has been no showing of the requisite "reasonable belief" necessary under Cravero to justify the warrantless entry, with force, into the residence, and the contraband and all other items seized as a result of and as fruits of that entry should have been suppressed.

Significantly, Judge Kravitch of the Fifth Circuit panel dissented from both the original panel decision and the denial of the Petition for a panel rehearing on the grounds of a lack of probable cause. In her initial dissent, the Judge noted the factual distinctions between Cravero and the instant case. The arresting officer had not observed Ricky Lyons, the subject of the arrest warrant. The arresting officer's belief that Lyons was within the premises was based solely on an informant's tip. As distinguished from Rodriquez, supra, the informant had not seen Lyons on the premises, but had merely heard his voice in the background during a telephone call from Jimmy. After matching the telephone number with the residence, the officers, without first applying to a detached magistrate for a search warrant, proceeded to the premises where they detained the defendants and after entering and looking through the rooms, discovered not the subject of the arrest warrant but a cache of cocaine. "As in Cravero there was an arrest warrant but no exigent circumstances; unlike Cravero the evidence linking the subject to the premises was extremely fragile and insufficient to justify an entry without a search warrant." 606 F.2d at 548.

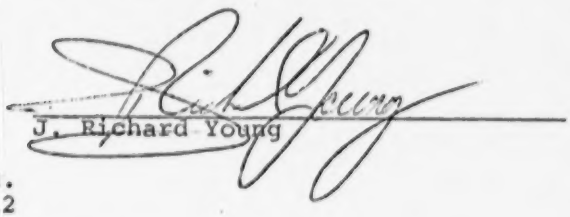
Furthermore, Judge Kravitch cited the Supreme Court's opinion in Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), wherein the doctrine announced in Terry v. Ohio, 392 U.S. 188 S.Ct. 1868, 20 L.Ed.2d 889 (1968), was extended to include a stop based not only on the policeman's observations but also on an informant's tip which did not satisfy the Aguilar and Spinelli criteria. "Adams and Terry involved a minimal invasion of privacy, however, as compared with the greater intrusion occasioned by the search of a third party's private home. When an intrusion of such magnitude occurs, if not based upon the policeman's personal observations, nothing short of a full-fledged Aguilar/Spinelli tip should be acceptable." 606 F.2d at 549.

Finally, Judge Kravitch also dissented from the per curium opinion denying the petition for rehearing. Besides expressing concern over the extension of the Cravero rule, "a rule of questionable validity and wisdom even in the less egregious circumstances present in that case," the Judge disagreed with the majority that the tenuous information appended to the panel opinion satisfies the teachings of Aguilar and Spinelli. 615 F.2d at 644.

CONCLUSION

For the above-mentioned reasons, a Writ of Certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully Submitted,



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APPENDICES

Moye, Jr., J., convicted defendants of possession of cocaine and of conspiracy to possess cocaine with intent to distribute and convicted one of the defendants of unlawful importation of cocaine, and defendants appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) agents had objective grounds for forming reasonable belief that fugitive was present at third party's premises, and thus warrantless entry of premises was proper, even though fugitive named in arrest warrant was not found to be present on premises at the moment of entry; (2) refusal of district court to order Government to provide defendants' expert witness with primary reference sample for use in an independent laboratory analysis was not a denial of due process of law; (3) evidence was sufficient to sustain convictions; (4) trial court did not err in failing to dismiss indictment on grounds of double jeopardy; and (5) trial court did not err in giving supplemental charge to the jury.

Affirmed.

Kravitch, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Arrest ⇐68

When an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the subject.

2. Arrest ⇐68

Where valid warrant for arrest of certain individual was outstanding and first-hand information from reliable informant established that that individual recently had been and was believed still to be in the dwelling containing certain telephone, Drug Enforcement Administration agents had objective grounds for forming reasonable belief that fugitive was present at the premises in question when they entered and, having such a reasonable belief, warrantless entry of premises was proper.

3. Arrest ⇐68

Fact that fugitive named in arrest warrant was not found to be present on third person's premises at moment of entry by agents did not render entry invalid.

4. Constitutional Law ⇐268(5)

District court's refusal to order Government to provide defendants' expert witness with the primary reference sample for use in an independent laboratory analysis did not deny defendants due process of law, where defendants failed to show that denial prevented their expert from conducting an independent analysis to show that seized substance was not cocaine. U.S.C.A.Const. Amends. 5, 14; Fed.Rules Crim.Proc. rule 16(a)(1)(C), 18 U.S.C.A.

5. Conspiracy ⇐47(12)

Drugs and Narcotics ⇐123

Evidence was sufficient to sustain conviction of possessing cocaine and conspiracy to possess cocaine with intent to distribute. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

6. Criminal Law ⇐1144.13(7)

Sufficiency of evidence to establish defendant's knowledge and intent had to be viewed in the light most favorable to the Government on appeal with all credibility choices considered in support of the jury verdict.

7. Criminal Law ⇐182

Under ordinary circumstances, a defendant's request for a mistrial removes any constitutional barrier to retrial, but where "prosecutorial overreaching" is present, interests protected by double jeopardy clause outweigh public interest in conducting second trial ending in acquittal or conviction; to find such "prosecutorial overreaching," government must have, through gross negligence or intentional misconduct, caused aggravated circumstances to develop which seriously prejudice a defendant, causing him to reasonably conclude that continuation of tainted proceeding will result in a conviction. U.S.C.A.Const. Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

8. Criminal Law ⇐182

In order to determine whether there exists prosecutorial overreaching barring retrial following mistrial, analysis must consider totality of the circumstances prior to the mistrial.

9. Criminal Law ⇐182

Where transcript of defendant's statement which prosecutor provided to the press contained no information that had not been introduced previously in the presence of the jury, where prosecutor's actions appeared to have been motivated by defendant to ensure accuracy in the press' accounts, trial court did not err in denying motion to dismiss indictment on grounds of double jeopardy following mistrial which was required because of publication of prejudicial article in local newspaper, despite defendant's claim that prejudicial material in the article arose from statement attributed to defendant and furnished to the press by the prosecutor, as prosecutor's actions did not constitute "prosecutorial overreaching." U.S.C.A.Const. Amend. 5.

10. Criminal Law ⇐863(2)

In prosecution for possession of cocaine and for conspiracy to possess cocaine with the intent to distribute, trial court's supplemental charge to the jury, which expressly cautioned jury not to consider supplemental charge in isolated context but to consider entire charge as given, ascribing no greater weight to supplemental charge than to original charge, was proper, where original and supplemental charges, when considered as combined charges, accurately covered points of law at issue.

Albert M. Horn, Atlanta, Ga., for defendant-appellant in 78-5329.

Robert A. Boas, Asst. U. S. Atty., Atlanta, Ga., for U. S. in both cases.

P. Bruce Kirwan, Federal Public Defender, J. Richard Young, Asst. Public Defender, Atlanta, Ga., for defendant-appellant in 78-5416.

William L. Harper, U. S. Atty., Atlanta, Ga., for U. S. in 78-5416.

Appeals from the United States District Court for the Northern District of Georgia.

Before THORNBERRY, CLARK and KRAVITCH, Circuit Judges.

CHARLES CLARK, Circuit Judge:

Hoyt A. Gaultney and Gary K. Steagald were convicted of possessing cocaine in violation of 21 U.S.C. § 841(a)(1), and with conspiracy to possess cocaine with the intent to distribute in violation of 21 U.S.C. § 846. Additionally, Gaultney was convicted of the unlawful importation of cocaine in violation of 21 U.S.C. § 952(a). They appeal, raising a variety of issues. We affirm.

Gaultney and Steagald argue first that the original entry by local police and federal agents into the premises in which cocaine subsequently was found was unlawful, in that the entry was neither pursuant to a search warrant nor justified by probable cause and exigent circumstances. The evidence shows that on January 4, 1978, Special Agent Joseph Rassey of the Federal Drug Enforcement Administration [DEA] in Detroit, Michigan, was contacted by a confidential informant. The informant advised that he might be able to locate "Ricky Lyons," whom he believed to be wanted by the DEA, and another individual named "Jimmy," whom he believed to be wanted on state drug charges in Georgia. The informant advised that "Jimmy" currently was using the alias "Carl James." Additionally, the informant stated that he had known both of these individuals personally.[1] Agent Rassey did not know the status of either individual, but because this informant's information had been reliable in the past,[2] Rassey told the informant to call as

1. Special Agent Rassey testified that the confidential informant had known "Jimmy" and Ricky Lyons for a number of years and had spoken to "Jimmy" in the Detroit area during or just before Christmas 1977.

2. Special Agent Rassey testified that he had known the informant for approximately four or five years, that the informant had furnished reliable information to the DEA in the past, and that on the basis of such information seven

soon as the individuals were located at a definite spot. On Saturday evening, January 14, 1978, Rassey received a telephone call from the informant advising that he had spoken with "Jimmy" by telephone and had been given a telephone number in the Atlanta, Georgia, area where "Jimmy" and Ricky Lyons would be within the next twenty-four hours.[3] The informant gave this telephone number to Rassey, who, in turn, gave it to Special Agent Kelly Goodowens of the DEA's Savannah, Georgia, District Office on Monday, January 16. Goodowens was aware that one Richard Harrison Lyons, a/k/a "Ricky" Lyons, had been indicted six months earlier in the Southern District of Georgia, in a marijuana smuggling case. Upon further investigation, Goodowens determined that an arrest warrant had been issued for Lyons and that the DEA still listed Lyons as a fugitive. Thereafter, Goodowens contacted the telephone company and learned that the telephone number provided by Agent Rassey's informant was listed to a Richard E. Fisher at a rural address in Buford, Georgia.

On Monday, January 16, 1978, Rassey received another telephone call from his informant, who advised that a recent telephone conversation with "Jimmy" confirmed his presence at the telephone number previously given Rassey by the informant. The informant also stated that Ricky Lyons was at the same location, noting that he had heard Lyon's voice in the background during his telephone conversation with "Jimmy." Rassey had several other telephone conversations with the informant between January 16 and the morning of January 18. Each time the informant confirmed that "Jimmy" and Ricky Lyons were still at the location of the telephone number. The informant also advised Rassey that several other people would be with Lyons at the location. This information was passed along to Goodowens by Rassey in a series of telephone conversations, the last taking place on the morning of Wednesday, January 18, 1978.

On the afternoon of January 18, Goodowens and DEA Agents Wayne Smith and James Williams, after consulting with a telephone company installer and local police, located the address to which the telephone number was listed. On driving past the house, these agents observed a Volkswagen parked in the driveway and smoke coming from the chimney of the house. No people were observed outside in the vicinity of the house or automobile. Approximately thirty minutes later, after coordinating plans for the execution of the arrest warrant on Ricky Lyons, Agents Goodowens, Smith, and Williams led a force of approximately twelve federal agents and local police officers to the residence. Upon approaching the house, Goodowens and Smith noticed two men located near the rear of the parked Volkswagen, which now had its engine cover up. Smith at first believed one of the men to be Ricky Lyons, but, upon realizing he was not, continued toward the house. One of the two men, later identified as Gaultney, was armed. Both Gaultney and the other man, later identified as Steagald, were detained pending Smith's return from the house.

Agent Smith arrived at the house and knocked on the front door. Gaultney's wife, Cathy, answered the door. Smith advised Mrs. Gaultney that he was a police officer with an arrest warrant. He asked to come into the house and was admitted. Smith told Mrs. Gaultney he had an arrest warrant for Ricky Lyons and asked if Lyons was in the house. Mrs. Gaultney stated that there was "no one by that name" in the house. Smith then told Mrs. Gaultney to place her hands on the wall and asked Detective Conway to watch her.

drug-related arrests had occurred. Rassey further testified that three convictions had been obtained in those cases and that four cases were pending. Counsel for Gaultney admitted at oral argument that the past reliability of the confidential informant was not at issue.

3. Special Agent Rassey testified that: "On the day the informant called me and said he had received a phone number from Jimmy, and it was a number where Jimmy and Ricky were going to be within the next twenty-four hours."

Smith began a sweep search of the premises.

Agent Smith walked down a short hall to his right and looked first in a bathroom situated between two bedrooms. Seeing no one in the bathroom, but observing a light coming from under the door to the front bedroom on his right, he opened the door and entered. Immediately inside Smith observed a small table upon which was a set of triple beam balance scales, a clear plastic bag containing a white powder, and a box containing a roll of clear plastic bags. Smith completed the sweep search of the premises without locating Lyons. He returned outside to advise the other officers of what he had discovered in the house. Agent Goodowens then entered the house and, upon entering the front bedroom, saw the scales, the bag of white powder, and the roll of plastic bags on a small table, together with what appeared to be more bags of white powder partially visible inside a green garbage bag lying in an open suitcase on the bed. Approximately fifteen minutes later, Agent Smith left for Atlanta to obtain a search warrant for the house. Upon obtaining a warrant, Smith telephoned the agents who had remained at the house and advised them of the existence of the warrant.

About this time, a truck occupied by a man and woman arrived at the house. Based on information obtained from appellant Gaultney, the agents believed the truck to contain "Jimmy," the state fugitive about whom Rassey's informant had spoken. This individual immediately was detained on his entry to the house and initially declined to identify himself any further than his first name of Jimmy. Later, the individual produced a North Carolina driver's license bearing the name "Carl James." That evening, the individual was identified as James Albert Smith, who was wanted by state authorities on drug charges.

A subsequent search of the house conducted pursuant to the warrant obtained by Agent Smith revealed a variety of narcotics processing paraphernalia and some 43 pounds of almost pure cocaine.[4]

[1] The law of this circuit is settled that "when an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the subject." *United States v. Cravero*, 545 F.2d 406, 421 (5th Cir. 1976), *cert. denied sub nom. Miller v. United States*, 429 U.S. 1100, 97 S.Ct. 1123, 51 L.Ed.2d 549 (1977), *and cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977). *See United States v. James*, 528 F.2d 999, 1017 (5th Cir. 1976), *cert. denied sub nom. Henry v. United States*, 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326 (1977); *Rodriguez v. Jones*, 473 F.2d 599, 605–06 (5th Cir.), *cert. denied*, 412 U.S. 953, 93 S.Ct. 3023, 37 L.Ed.2d 1007 (1973). As stated in *Cravero*, the test properly is framed in terms of the officer's reasonable belief.

> Reasonable belief embodies the same standards of reasonableness [as does probable cause] but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances.

545 F.2d at 421.

[2, 3] A review of the facts in this case discloses that a valid warrant for the arrest of Richard Harrison Lyons, a/k/a "Ricky" Lyons was outstanding and that first-hand information from a reliable informant established that Lyons recently had been and was believed still to be in the dwelling containing the telephone. Based on these facts, the agents had objective grounds for forming a reasonable belief that the fugi-

4. The search revealed a clear plastic bag containing 450 grams of 45% pure cocaine hydrochloride, two suitcases containing 8,394 grams of 99% pure cocaine hydrochloride and 10,445 grams of 95% pure cocaine hydrochloride respectively, a box of clear plastic bags, two sets of Ohaus triple beam balance scales, and a bag containing beta-manitol, a common cutting agent for cocaine.

tive was present at the premises in question when they entered. *United States v. James*, 528 F.2d at 1017; *Rodriguez v. Jones*, 473 F.2d at 666. Having such a reasonable belief, the agent's warrantless entry of the premises was proper. *United States v. Cravero*, 545 F.2d at 421. The fact that the fugitive named in the arrest warrant was not found to be present on the premises at the moment of entry does not render the entry invalid. *United States v. James*, 528 F.2d at 1017; *United States v. Hofman*, 488 F.2d 287, 289 (5th Cir. 1974).

Counsel refers this court to the cases of *Payton v. New York* and *Riddick v. New York*, recently we argued at the Supreme Court.[5] There, New York State statutes authorizing the entry of a suspect's home in the absence of exigent circumstances to effect the suspect's *warrantless arrest* are challenged as being violative of the fourth amendment. These cases, and the issue thus presented to the Supreme Court, are inapposite to the issue before this court today. Today, we apply the reasonable belief standard announced in *Cravero* where the entry occurs to execute an existing, valid arrest warrant.

[4] Gaultney and Steagald further argue that the refusal of the district court to order the government to provide their expert witness with a primary reference sample[6] for use in an independent laboratory analysis constitutes a denial of due process of law. This court has held that

> Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion.

Barnard v. Henderson, 514 F.2d 744, 746 (5th Cir. 1975). *See* F.R.Crim.P. 16(a)(1)(C). In cases involving a controlled substance, courts have held a concomitant part of the examination or inspection to be the right of the accused to have an independent chemical analysis performed on the seized substance. *See, e. g., United States v. Pollock*, 402 F.Supp. 1310, 1312 (D.Mass.1975); *United States v. Acarino*, 270 F.Supp. 526, 528 (E.D.N.Y.1967). *See also, United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978). Our inquiry, therefore, focuses on whether the refusal of the district court to order the government to provide the defendant's expert with a primary reference sample placed an unreasonable restriction on the defendant's right to an independent analysis so as to deny him due process of law.

The facts disclose that the parties agreed that the independent analysis of the seized substance would be conducted at the Georgia State Crime Laboratory [GSCL] in Atlanta, Georgia. The GSCL has and enforces a policy of not supplying visiting independent examiners with a primary reference sample of controlled substances. Testimony from a government witness stated that the GSCL adheres to this policy for three reasons. First, independent examiners who are licensed to possess controlled substances are allowed by law to possess their own primary reference samples. *See generally* 21 U.S.C. §§ 821-24; 21 C.F.R. § 1301; Ga.Code Ann. §§ 79A-813 to -816. Second, those independent examiners not so licensed can purchase "exempt standards"[7] from

5. The Court of Appeals of New York affirmed the defendants' convictions in these cases. *People v. Payton*, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978). On appeal, the United States Supreme Court noted probable jurisdiction 439 U.S. 1064, 99 S.Ct. 718, 58 L.Ed.2d 703 (1978). The cases were argued on March 26, 1979, 47 U.S.L.W. 3651 (U.S. April 3, 1979) and subsequently were restored to the calendar for reargument. — U.S. —, 99 S.Ct. 2049, 60 L.Ed.2d 658 (1979). The cases were reargued on Oct. 9, 1979. See 48 U.S.L.W. 3251 52 (U.S. Oct. 16, 1979); 48 U.S.L.W. 3267 (U.S. Oct. 23, 1979) (Nos. 78 5420, -54).

6. A primary reference sample is a sample of the drug in question, here cocaine hydrochloride, whose quality and purity are known.

7. An exempt standard is a mixture containing a controlled substance, here cocaine hydrochloride, that is prepared for laboratory, industrial, educational or special research purposes and is packaged in such a manner, combination, quantity, proportion, or concentration so as not to present a potential for abuse. *See* 21 C.F.R. §§ 1308.23-.24.

various private manufacturers. Third, various analytical chemistry techniques utilizing instruments available at the GSCL allow an analysis of an unknown compound without the use of a reference sample, either primary or exempt.

Gaultney and Steagald make no showing that the policy of the GSCL prevented their expert from conducting an independent analysis to show that the seized substance was not cocaine. The record indicates that the expert never availed himself of the opportunity to examine the seized substance to determine whether he could make an independent analysis of its contents. Despite never previously having attempted an analysis using an exempt standard, the expert testified that any tests he might run restricted by the GSCL guidelines would yield results inferior to those obtained by the government's tests. This contention was vigorously disputed by the testimony of the GSCL Senior Forensic Chemist. In light of this conflicting testimony, there was no error in the trial court's determination that the GSCL policies regarding primary reference samples are reasonable. They did not operate to deprive appellants of due process of law.

[5] Steagald additionally argues that the evidence produced at trial was insufficient to prove the requisite knowledge and intent to sustain his convictions. The evidence produced at trial shows that on September 16, 1977, Steagald contacted the Able-1 Answering Service in Atlanta, Georgia, to arrange a telephone answering service for the Rosen Import Company, Inc. A written agreement for such services was executed on behalf of Rosen Import Company by "G. K. Steagald (mgr.)." Able-1 subsequently received a check from Rosen Import Company, signed by G. K. Steagald, in payment for services rendered. On January 12, 1978, Steagald executed a lease agreement for warehouse space at 100-D Mill Street in Lawrenceville, Georgia. Steagald leased the warehouse in his own name and paid the first month's rent with a check drawn on the account of Rosen Import Company. On January 12, 1978, Bruce Duncan & Co., customs house brokers in Atlanta, Georgia, received a call from the Delta Airlines Airfreight Office [Delta] at Hartsfield International Airport in Atlanta, advising that Delta was holding a shipment of sixteen cartons of lamps and brass table bases from Colombia, South America, and were consigned to Rosen Import Company. Having handled previous Rosen Import Company shipments, Bruce Duncan & Co. was familiar with Steagald as a representative of that company and therefore called to advise him that this shipment had arrived. Steagald requested that Bruce Duncan & Co. arrange for delivery of the shipment for the next day because "his customers needed the products." Bruce Duncan & Co., acting on information furnished by Steagald, contacted Theatres Service Company [TSC] regarding the delivery of the shipment. On January 14, 1978, after contact with both Delta and Steagald, TSC delivered sixteen crates to the warehouse at 100-D Mill Street. Steagald paid the freight charges with a Rosen Import Company check, signed for the shipment, and received a copy of the freight waybill as his receipt.

Steagald argues that the evidence produced is consistent with the innocent activities of an importer and that the government's evidence, by failing to place him inside the Buford, Georgia, house, fails sufficiently to prove knowledge and intent. However, the government's evidence also showed that during the search of the Buford, Georgia, house, the copy of the TSC freight waybill received by Steagald upon delivery of the sixteen crates to the Mill Street warehouse was discovered on the dining room table. Additionally, agents found in the house two blank Rosen Import Company checks bearing the next two consecutive numbers to that on the check used by Steagald to pay the TSC freight charges. The evidence further showed that Steagald, when taken into custody, was wearing only slacks and a long-sleeve shirt, clothing inconsistent with the coldness of the January afternoon, and that once taken inside the

Buford, Georgia, house, told a DEA agent that he was cold and requested that she get a sweater or coat for him from the kitchen area. Moreover, on January 20, DEA agents obtained a search warrant for the warehouse located at 100-D Mill Street. There, agents discovered numerous wooden crates that had been opened previously and a large number of lamps and brass table bases. All the brass table bases were hollow inside. During the search agents discovered a bag of white powder, subsequently determined to be 483 grams of cocaine, 70% pure, inside one of the brass table bases.

[6] The sufficiency of the evidence to establish Steagald's knowledge and intent must be viewed in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), with all credibility choices considered in support of the jury verdict. *United States v. Barresi*, 601 F.2d 193, at 195 (5th Cir. Aug. 22, 1979); *United States v. Black*, 497 F.2d 1039 (5th Cir. 1974). Applying this standard, there was sufficient evidence to support the jury's verdict.

[7, 8] Steagald further contends that the trial court committed reversible error when it failed to dismiss the indictment on grounds of double jeopardy. Steagald's first trial ended when, pursuant to his motion, the trial court declared a mistrial because of the publication of a prejudicial article in a local newspaper. Steagald claims that the prejudicial material in the article arose from a statement attributed to Gaultney and furnished to the press by the United States Attorney. Steagald argues that this action constitutes prosecutorial overreaching of such magnitude as to require application of the bar of double jeopardy. The law in this circuit was stated in *United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976):

> [U]nder ordinary circumstances, a defendant's request for a mistrial removes any constitutional barrier to retrial. . . . But the Supreme Court recognizes that there may be exceptions to that rule—rare cases involving circumstances which are "attributable to prosecutorial • • • overreaching." . . .
>
> Where "prosecutorial overreaching" is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction. . . .
>
> . . . .
>
> To find "prosecutorial overreaching," the Government must have, through "gross negligence or intentional misconduct," caused aggravated circumstances to develop which "seriously prejudice[d] a defendant" causing him to reasonably conclude that a continuation of the tainted proceeding would result in a conviction.

530 F.2d at 1255–1256. This analysis must consider the totality of the circumstances prior to the mistrial in order to determine whether prosecutorial overreaching existed. *Id.* at 1256.

[9] Under *Kessler*'s test, the prosecutor's actions do not come close to prosecutorial overreaching. The record, as clarified by counsel during oral argument, shows that the transcript of Gaultney's statement that the prosecutor provided to the press contained no information that had not been introduced previously in the presence of the jury. Indeed, the United States Attorney's actions appear to have been motivated by a desire to ensure accuracy in the press's accounts. There was no error in the trial court's denial of Steagald's motion to dismiss the indictment on grounds of double jeopardy.

[10] Finally, Steagald contends that the trial court committed reversible error in its supplemental charge to the jury, first by refusing to recharge on specific intent and reasonable doubt and second by inaccurately defining intent by failing to refer to specific intent. A review of the supplemental charge to the jury, together with the court's original charge, discloses no error. The district court in its supplemental charge expressly cautioned the jury not to consider his supplemental charge in an iso-

lated context, but to consider the entire charge as given, ascribing no greater weight to the supplemental charge than to the original charge. In so doing, the district court took an appropriate and previously approved step to ensure a balanced charge so as to avoid any possibility of prejudice to the defendant. *United States v. Sutherland*, 428 F.2d 1152, 1157-58 (5th Cir. 1970), *cert. denied*, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed.2d 668 (1972). Furthermore, the original and supplemental charges, when considered as combined charges, accurately cover the points of law at issue. *United States v. Blevins*, 555 F.2d 1236, 1239 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016, 98 S.Ct. 733, 54 L.Ed.2d 761 (1978).

The convictions of Hoyt A. Gaultney and Gary K. Steagald are

AFFIRMED.

KRAVITCH, Circuit Judge, dissenting:

I respectfully dissent from that portion of the opinion relating to the entry and search of the premises.

United States v. Cravero, 545 F.2d 406 (5th Cir.), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977), permitted, without a search warrant, the entry of premises of a third party for execution of an arrest warrant, based upon the officer's *reasonable belief* that the subject of the arrest warrant was within the building. The court reasoned that despite a lack of exigent circumstances, an officer who has already been to the magistrate once to secure the arrest warrant need not make an additional trip if he has determined that the suspect is within certain premises. 545 F.2d at 421.

In *Cravero* the officers personally had observed the subject enter the dwelling and, after maintaining surveillance for several hours, reasonably concluded that the subject was still within the house. Here, however, we are confronted with a different factual situation. The arresting officer had not observed Ricky Lyons, the subject of the arrest warrant. His belief that Lyons was within the premises was based solely upon an informant's tip. The informant had not seen Lyons on the premises,[1] but had merely heard his voice in the background during a telephone call from Jimmy, Lyons' companion, who stated that he and Lyons were at the location of a given telephone number. After matching the telephone number with a residence,[2] the officers, without first applying to a detached magistrate for a search warrant, proceeded to the premises where they detained the defendants and, after entering and looking through the rooms, discovered not the subject of the arrest warrant, but a cache of cocaine. As in *Cravero* there was an arrest warrant but no exigent circumstances; unlike *Cravero* the evidence linking the subject to the premises was extremely fragile and insufficient to justify an entry without a search warrant.[3]

In *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), the Supreme Court extended the *Terry* doctrine[4] to include a stop based not only on the policeman's observations but also on an informant's tip which did not satisfy the

1. Compare with *Rodriguez v. Jones*, 473 F.2d 599 (5th Cir.), *cert. denied*, 412 U.S. 953, 93 S.Ct. 3023, 37 L.Ed.2d 1007 (1973) where informant had observed the subject enter the building.

2. No address or name of resident was furnished by informant, but these were ascertained from the telephone company.

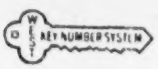
3. The circuits are not in accord on this issue. The Third Circuit, in *Government of Virgin Islands v. Gereau*, 502 F.2d 914, 928 (3rd Cir. 1974), *cert. denied*, 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed.2d 323 (1976), held: "Although police have warrants for the arrest of suspects, they may enter premises, at least of third persons, to search for those suspects only in exigent circumstances where the police officers also have probable cause to believe that the suspects may be within." However, the Tenth Circuit, citing *Cravero* as authority, affirmed denial of a motion to suppress in a case factually similar to the case before us. *United States v. Harper*, 550 F.2d 610 (10th Cir. 1977), *cert. denied*, 434 U.S. 837, 98 S.Ct. 128, 54 L.Ed.2d 99 (1977).

4. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Aguilar-Spinelli criteria.[5] *Adams* and *Terry* involved a minimal invasion of privacy, however, as compared with the greater intrusion occasioned by the search of a third party's private home. When an intrusion of such magnitude occurs, if not based upon the policeman's personal observation, nothing short of a full-fledged *Aguilar-Spinelli* tip should be acceptable.

Therefore, I would reverse the denial of the motion to suppress.

I concur with the remainder of the opinion relating to the other grounds of appeal.



UNITED STATES of America,
Plaintiff-Appellee,

v.

James D. ANDREW,
Defendant-Appellant.

No. 78-5770.

United States Court of Appeals,
Fifth Circuit.

Nov. 13, 1979.

Defendant was convicted in the United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., of violating federal criminal bank statutes and he appealed. The Court of Appeals held that: (1) there was no prejudice in trying defendant and codefendant together, and (2) trial court properly admitted into the evidence certain summary charts of one government witness.

Affirmed.

1. Criminal Law ⇐622(2)

Where each defendant testified and denied culpability in the case, there was no prejudice in trying the two defendants together on their charges of violating federal criminal bank statutes. 18 U.S.C.A. §§ 656, 1005; Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

2. Criminal Law ⇐437

Although, in three instances out of nearly 200 times, witness was unable to testify positively that certain cash items at the bank were ultimately deposited on the same day in the defendant's checking account, trial court did not err in admitting into evidence certain summary charts of that government witness where the court's instructions to jury made it clear that the ultimate decision should be made by the jury as to the weight to be given to the evidence. Fed.Rules Evid. rules 401-403, 28 U.S.C.A.

Michael S. Tarre, (Court-Appointed), Miami, Fla., for defendant-appellant.

Hugh F. Culverhouse, Jr., Asst. U. S. Atty., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before AINSWORTH, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

[1, 2] James D. Andrew appeals from his conviction on numerous counts of violating federal criminal bank statutes, to wit, 18 U.S.C. § 656, relating to theft, embezzlement or misapplication by bank officer or employee, and 18 U.S.C. § 1005, pertaining to making false entries in the bank's books. We have carefully considered the two points of error asserted on appeal by appellant Andrew and find them to be without merit. Appellant charges that there was error in the trial in district court because he was not granted a severance from his code-

5. *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

court with directions to vacate the order of dismissal of the claim for monetary damages. We further direct the court to hold the claim in abeyance pending the administrative resolution of plaintiff's remaining claims.[17] *See Concordia v. United States Postal Service*, 581 F.2d 439, 444 (5th Cir. 1978).

AFFIRMED IN PART; REVERSED AND REMANDED IN PART WITH DIRECTIONS.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Hoyt Albert GAULTNEY,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Gary Keith STEAGALD,
Defendant-Appellant.

Nos. 78-5329, 78-5416.

United States Court of Appeals,
Fifth Circuit.

April 14, 1980.

Defendants were convicted before the United States District Court for the Northern District of Georgia, Charles A. Moye, Jr., J., of drug offenses, and they appealed. The Court of Appeals affirmed, 606 F.2d 540. Petition for rehearing and petition for rehearing en banc were filed. The Court of Appeals held that knowledge of confidential informant's past reliability and precise method by which he gathered his information provided sufficient underlying circumstances from which government agent, who executed warrantless entry to execute search warrant could conclude that informant was reliable and that information he furnished as to location of fugitive was credible.

Petition for panel rehearing granted in part and denied in part.

Petition for rehearing en banc denied.

Kravitch, Circuit Judge, filed dissenting opinion.

1. Criminal Law ⇐394.6(5)

Where information leading to formulation of police officer's reasonable belief is supplied by a confidential informant, a defendant at a motion to suppress hearing may challenge the validity of the information under *Aguilar* and *Spinelli*.

2. Arrest ⇐63.4(8)

In case of warrantless entry based on information supplied by an informant, the inquiry at a suppression hearing is simple and straightforward: here the officers who decided to act on the information supplied by the confidential informant aware at the time they chose to act of "underlying circumstances" making the informant "reliable" and his information "credible."

hold the claim in abeyance, we eliminate needless guessing, and if we have erred, it is on the side of caution.

17. Although "practical notions of judicial efficiency" dictate that plaintiff's damage claim be held in abeyance, we are concerned about the delay and inconvenience which this procedure may entail. At oral argument counsel for defendant-appellee indicated that a hearing before the ABCMR was scheduled for January 9, 1980, and that a decision would follow within two or three months. We do not know whether this hearing has taken place, or whether one is currently scheduled. In view of the fact that plaintiff's case has already been pending before the ABCMR for two years, we feel that some time limit should be placed on our stay of plaintiff's claim for damages. We therefore place a July 1, 1980 expiration date on our order to hold plaintiff's claim in abeyance. If the ABCMR has not rendered a decision in plaintiff's case by that date, the district court should set down plaintiff's damage claim for trial at the earliest convenient time.

3. Arrest ⇐63

Where confidential informant's record of reliability was known to officer and officer was aware that informant had known alleged fugitives for a number of years and had been given telephone number where fugitives could be reached within next 24 hours and that during a subsequent telephone conversation with one of them informant had heard the other's voice in background, knowledge of past reliability and method by which informant got his information provided sufficient underlying circumstances from which officer, who relied on informant's statements in making warrantless entry to execute arrest warrant, could properly conclude that informant was reliable and his information credible.

Albert M. Horn, J. Richard Young, Asst. Public Defender, Atlanta, Ga., for defendant-appellant.

Robert A. Boas, Asst. U. S. Atty., Atlanta, Ga., for plaintiff-appellee.

Appeals from the United States District Court for the Northern District of Georgia.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

[Opinion Nov. 13, 1979, 606 F.2d 540 (5th Cir. 1979)]

Before THORNBERRY, CHARLES CLARK and KRAVITCH, Circuit Judges.

PER CURIAM:

[1-3] The decision of this panel in these actions appears at 606 F.2d 540 (5th Cir. 1979). On petition for panel rehearing, the majority opinion is modified by inserting the following paragraph after the thirteenth line, in the first column, on page 545:

Where the information leading to the formulation of the officer's reasonable belief is supplied by a confidential informant, a defendant at a motion to suppress hearing may challenge the validity of the information under *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 394 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). *See generally Rodriguez v. Jones*, 473 F.2d 599, 605-06 n.3 (5 Cir.), cert. denied, 412 U.S. 953, 93 S.Ct. 323, 37 L.Ed.2d 1007 (1973). The inquiry to be made is simple and straightforward: Were the officers who decided to act on the information supplied by the confidential informant aware at the time they chose to act of "underlying circumstances" making the informant "reliable" and his information "credible"? The record discloses that Agents Rassey and Goodowens were aware of such underlying circumstances. The confidential informant's record of past reliability was known to Agent Rassey and is unchallenged by appellants' counsel. *See* note 2, *supra* at 542-43. Additionally, Agent Rassey was aware that the informant had known both "Jimmy" and Ricky Lyons for a number of years, that the informant had spoken to "Jimmy" in the Detroit area during or just before Christmas 1977, that the informant on January 14, 1978, had spoken with "Jimmy" by telephone and had been given a telephone number in the Atlanta, Georgia, area where "Jimmy" and Ricky Lyons would be within the next twenty-four hours, and that during a subsequent telephone conversation with "Jimmy" the confidential informant had heard Ricky Lyons' voice in the background. Agent Rassey passed much of this information along to Agent Goodowens. The knowledge of both the confidential informant's past reliability and the precise methods by which he gathered his information in this case provided sufficient underlying circumstances from which the agent properly could conclude that the informant was reliable and the information he supplied was credible.

In all other respects, the petition for panel rehearing is DENIED.

A member of the court in active service having requested a poll on the reconsideration of these causes en banc, and a majority

of the judges in active service not having voted in favor of it, the petition for rehearing en banc is DENIED.

KRAVITCH, Circuit Judge, dissenting:

I disagree with the majority that the tenuous information appended to the panel opinion satisfies the teachings of *Aguilar* and *Spinelli*. The more important problem, however, is the extension of the rule announced in *United States v. Cravero*, 545 F.2d 406 (5th Cir. 1976), a rule of questionable validity and wisdom even in the less egregious circumstances present in that case. Expansion of this rule constitutes a disturbing erosion of the Fourth Amendment rights of third parties.

INDUSTRIAL INDEMNITY, INC., Plaintiff-Appellant,

v.

Moon LANDRIEU, Secretary of the Department of Housing and Urban Development of the United States of America, Defendant-Appellee.

No. 79-2748
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

April 14, 1980.

Building contractor's surety and assignee brought suit against the Secretary of Housing and Urban Development seeking payment for construction work on a housing project insured by the Secretary under a program authorized by the National Housing Act. The United States District Court for the Northern District of Texas, Robert W. Porter, J., dismissed for lack of subject-matter jurisdiction. Surety and assignee appealed. The Court of Appeals held that the National Housing Act waived sovereign immunity and federal question jurisdiction existed.

Reversed and remanded.

Federal Courts ⇐232
United States ⇐53(14)

National Housing Act waived sovereign immunity and authorized suit by building contractor's surety and assignee for payment for construction work on housing project insured by Secretary of Housing and Urban Development under program authorized by Act; federal question jurisdiction existed. National Housing Act, § 1 as amended 12 U.S.C.A. § 1702; 28 U.S.C.A. § 1331(a).

Baker & Botts, Richard K. Willard, Ralph S. Carrigan, Houston, Tex., for plaintiff-appellant.

Gwynn T. Swinson, Dept. of Justice, Civil Div., Commercial Litigat., Washington, D. C., for HUD.

Locke, Purnell, Boren, Laney & Neeley, Harriet E. Miers, Dallas, Tex., for Metropolitan.

Haynes & Boone, Robin P. Hartmann, Dallas, Tex., for Home Savings.

Appeal from the United States District Court for the Northern District of Texas.

Before GEE, RUBIN and POLITZ, Circuit Judges.

PER CURIAM:

In 1971, the Secretary of the Department of Housing and Urban Development (HUD) issued a commitment to insure a $2,143,000 mortgage for the construction of the Casa Claire apartment project in Mesquite, Texas, pursuant to § 221(d)(4) of the National Housing Act, 12 U.S.C. § 1715*l*(d)(4) (1976). Section 221(d)(4) is a program of mortgage insurance enacted by Congress to "assist

* Fed.R.App.P. 34(a); 5th Cir. R. 18.

FOURTH AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

RULE 4 OF THE
FEDERAL RULES OF CRIMINAL PROCEDURE

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

* * *

(c) Form.

(1) Warrant. The warrnat shall be signed by the magistrate and shall contain the name of the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate.

* * *

(d) Execution or Service; and Return.

* * *

(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest but upon request he shall show the warrant to the defendant as soon as

possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.

* * *

RULE 41 OF THE
FEDERAL RULES OF CRIMINAL PROCEDURE

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property or Persons Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuance and Contents.

(1) Warrant upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only to an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the

federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. (emphasis supplied).